

**WRITTEN QUESTIONS OF SENATOR CHUCK GRASSLEY TO DAWN
JOHNSON TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF
LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE**

1. Many times an Administration will not agree with a particular statute, even though the language and intent of Congress are crystal clear. In addition, many times an individual who has been appointed to enforce the laws may not personally agree with a particular statute on the books. Yet, you will be called on to enforce and defend the laws as written by the legislative branch, regardless of your own personal and philosophical views. If you are confirmed, will you commit to enforce and defend the laws and the Constitution of the United States, regardless of your personal and philosophical views on a matter?

Answer: Yes. I enforced and defended the laws and the Constitution of the United States, regardless of my personal and philosophical views, during my prior five years of service at the Office of Legal Counsel. Those who worked with me during that time—from throughout the Department of Justice and also top lawyers and officials from the CIA, the National Security Council, the Secret Service, and the Departments of Defense, Education, and Health and Human Services—have attested to that fact. If confirmed I would so again.

2. I think everyone would agree that protecting children and families from obscenity is a worthwhile objective. Do you concur that the Justice Department must continue to aggressively pursue criminal and civil litigation against those who violate federal obscenity laws? Why or why not?

Answer: I agree that obscenity falls outside the protection of the First Amendment and that laws designed to keep obscenity out of the hands of minors are important and must be enforced.

3. This past year, the U.S. Supreme Court held in the *Heller* case that the Second Amendment protects an individual's right to possess a firearm, regardless of their participation in a "well regulated militia." President-elect Obama stated that he supported an individual's right to possess a firearm and signaled his support for the *Heller* decision. What is your personal opinion of the rights afforded by the Second Amendment?

Answer: *Heller* holds that the Second Amendment protects an individual right to bear arms. If confirmed, I would certainly accept *Heller* as having answered that question and would provide legal advice consistent with that precedent.

4. What is your personal opinion of the *Heller* case?

Answer: I do not have a personal view because I have not studied the Second Amendment or the *Heller* case in any detail.

5. If you are confirmed, will you commit to protect an individual's right to possess a

firearm?

Answer: Yes.

6. Do you have any question as to the constitutionality of the False Claims Act and its *qui tam* provisions?

Answer: In general, I have no question about the constitutionality of the False Claims Act or its *qui tam* provisions. As with any statute, it is possible that particular applications could raise constitutional questions, but I hasten to add that I am not aware of any such applications of the False Claims Act. As you know, during the time I served at OLC, the office reversed a prior opinion that did raise broad concerns about the constitutionality of *qui tam* statutes.

7. Recently, a lawsuit was filed alleging that the seal provision of the False Claims Act, codified at 31 U.S.C. § 3730(b)(2), is unconstitutional. That provision requires that False Claims Act cases by *qui tam* relators be filed in camera and remain under seal for at least 60 days, and not be served upon the defendant until the court orders. This provision was designed to give the Government ample time to investigate an allegation before making the case public, while protecting evidence and the whistleblowers from undue harm or influence. The other benefit of the seal provision is that it allows frivolous complaints to remain under seal without causing harm to a defendant. In the past, I've been a critic of prolonged extensions of the seal. I believe the Justice Department should use the seal judiciously and not abuse its discretion. I also believe some transparency on the part of the Department would go a long way to dispelling questions about the seal. That said, I think the seal does a lot of good, especially in protecting whistleblowers against retaliation. Do you believe the seal provision of the False Claims Act is unconstitutional? Why or why not?

Answer: I have not yet had occasion to study that decision or the constitutionality of the seal provision of the False Claims Act, so I do not have an informed view regarding whether that provision is constitutional.

8. When we met a couple weeks ago, we discussed a December 5, 2001, Letter Opinion issued by the Office of Legal Counsel (OLC) to the General Counsel at the Department of the Treasury. The OLC Opinion titled, "Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members," concludes that the Privacy Act "prohibits the disclosure of Privacy Act-protected information to the ranking minority member" of a congressional committee of jurisdiction that requests information from a Federal agency. The OLC Opinion reached this conclusion despite the fact that the Privacy Act allows disclosures, "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee." Nowhere in the statute does it define "committee" to mean only the Chairman and not the Ranking Member.

Courts have also held views contrary to that of the OLC Opinion. For instance, the D.C. Circuit Courts of Appeal held that members of Congress have “constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information.” *Murphy v. Dep’t of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1 979). Further, the 2nd Circuit held that information sent to a congressman in his official capacity as a *member* of a subcommittee fell “squarely within the ambit of § 552a(b)(9)”. *See Devine v. United States*, 202 F.3d 547, 551 (2nd Cir. 2000).

Despite the plain language and the court interpretations, this opinion is often used as a shield to prevent disclosure of information to Ranking Members. Instead of citing case law, the OLC Opinion relies upon the “longstanding executive branch practice on this question,” and, perhaps more surprisingly, the dicta from Congressional Research Service memorandum, to reach this conclusion.

a. Do you support the position taken by DOJ in this OLC Opinion?

Answer: In general, I believe strongly that cooperation between the Department of Justice and Congress is appropriate and desirable, and I also have written extensively about the need for greater Executive Branch transparency. I have not yet had occasion to study the particular question addressed by the memorandum, and would need to do so at OLC in accordance with the traditional processes there, so I am not able to take a position on it at this time.

b. Do you believe that, as a general matter, Ranking Minority members of a Committee should be prohibited from obtaining information from an agency absent the approval of the Chairman? If so, why?

Answer: I believe as a general matter that agencies should endeavor to cooperate with and provide appropriate information to Congress. As noted above, I have not studied whether there is a legal basis for distinguishing between a ranking minority member of a Committee and the Chairman, so I am not able to take a position at this time.

c. In your opinion, couldn’t the wording of the Privacy Act that allows disclosure “to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof” be construed to allow disclosure to Ranking Members if the Administration was willing to do so? Please explain why or why not.

Answer: I have not studied the OLC opinion, nor have I read the statute, and have not had the benefit of OLC’s traditional processes for evaluating such a question, so I am unable to offer an informed response to this question at this time.

d. If you are confirmed, will you pledge to revise this OLC Opinion to allow disclosure to Ranking Members? Why or why not?

Answer: It would be improper for me to pledge to overrule or revise any OLC opinion. I can pledge that if I am confirmed and this question comes before OLC, I will carefully review the matter, using OLC's traditional and appropriate procedures.